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In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 23.

GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR THE MISSOURI-KANSAS-TEXAS RAILROAD, AN UNINCORPORATED ASSOCIATION,

Petitioner,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT, GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

HAROLD C. HEISS,
RUSSELL B. DAY,
822 Keith Building,
Cleveland, Ohio,

T. D. GRESHAM,
Esperson Building,
Houston, Texas,

Attorneys for said Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647

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JURISDICTION.

The petitioner, which will sometimes be referred to as the "Engineers' Brotherhood," or as the "Engineers," asserts that "this action arises under a law regulating commerce * * *, to-wit, the Railway Labor Act * * *." (First Amended Complaint, para. 1; R. 21) This is denied by the third party defendant, which will be hereinafter referred to as "this respondent," or as the "Firemen's Brotherhood" (Answer of third party defendant, para. 1; R. 37).

This case involves a conflict over the jurisdiction or bargaining authority of two labor unions, namely, the Brotherhood of Locomotive Engineers and the Brotherhood

of Locomotive Firemen and Enginemen. The petitioner is a subsidiary organization of the former; this respondent is a subsidiary organization of the latter. It is common knowledge that these two Brotherhoods have represented the engineers' craft and the firemen's craft, respectively, in collective bargaining with most of the railroads in the United States and Canada over a long period of time.

The petitioner contends that with the enactment of the Railway Labor Act, the jurisdiction or bargaining authority of railway labor unions, as between each other, became defined. Certain items of joint interest to both the engineers' and firemen's crafts have been the subject of collective bargaining by both Brotherhoods with the railroads, and with each other, virtually since their inception. But these items were, the petitioner asserts, removed by the Railway Labor Act from the accustomed jurisdiction of the Firemen's Brotherhood, and placed within the exclusive bargaining authority of the Engineers' Brotherhood.

It is the position of the Firemen's Brotherhood that the Railway Labor Act contains no provision purporting to define the respective bargaining authority or jurisdiction of railway labor unions, that such a result is foreign to the purposes and objectives of the Act, and that, in consequence, the right which the Engineers' Brotherhood here attempts to assert under the Act is so plainly nonexistent that the federal question involved is unsubstantial and inadequate as a basis of federal jurisdiction.

STATEMENT OF THE CASE.

The immediate object of this action is to have an agreement, generally known as the Mediation Agreement of December 12, 1940 (hereinafter referred to as "the Mediation Agreement"), in effect between the respondents, the Missouri-Kansas-Texas Railroad Company and the Missouri-Kansas-Texas Railroad Company of Texas (hereinafter

referred to as the M-K-T Railroad) and the Firemen's Brotherhood declared invalid on the grounds that the subject matter of the agreement has been placed by the Railway Labor Act beyond the bargaining authority of the Firemen's Brotherhood, and within the exclusive jurisdiction of the Engineers' Brotherhood. This attack upon the jurisdiction of the Firemen's Brotherhood is premised upon the hypothesis that the Railway Labor Act has divided the whole field of collective bargaining between a carrier and its numerous crafts or classes of employees into separate and exclusive areas or compartments. Each of these areas or compartments represents the sum total of items or interests that may be the subject of collective bargaining between the representative of a particular craft or class of employees and the carrier. The items covered by the Mediation Agreement are said by the petitioner to have been placed by the Act in the area or compartment of subjects allotted to the engineers' craft. Hence, the M-K-T Railroad and the Firemen's Brotherhood were bargaining in forbidden territory when, acting under the sponsorship of the National Mediation Board, they entered into the agreement of December 12, 1940.

If the hypothesis relied upon by the plaintiff is sound, then the problem faced by this Court in resolving this case requires merely an understanding of the items or subjects covered by the Mediation Agreement and a decision on the question whether these items or subjects belong in the category of subjects allotted by the Railway Labor Act to the firemen's representative, or to the engineers' representative.

This approach to the case has been adopted, also, by the Solicitor General (Brief for the United States, pp. 34-45). He began by embracing the hypothesis in its entirety: "Although the principle seems clear enough, its application where the work of the two crafts is so interrelated as here is quite difficult" (Brief, p. 35). And his resolution of the

one question thus presented for decision is typified by his treatment of the first paragraph of the 1940 Agreement in the following manner:

> "This paragraph of the 1940 Agreement regulates the order in which men are called to service as engineers. It does not merely determine the order in which they shall stop working as firemen. * * * This is a subject clearly within the exclusive jurisdiction of the representative of the Engineers." (Brief, p. 43.)

If this approach to the case is the proper one, then the statement of the case as made by the petitioner in its brief is a substantially complete and adequate presentation of such facts as need to be taken note of by this Court.

It is the position of the Firemen's Brotherhood, however, that this treatment of the case is superficial and tends to beg the major question involved, to-wit, whether the Railway Labor Act assumes to outline or define the bargaining jurisdiction of a craft's representative. The respondents are not aware that the Railway Labor Act assumes to enter the field of jurisdictional disputes between labor organizations or the crafts they represent. The Firemen's Brotherhood contends, to the contrary, that the Railway Labor Act contains no language or provision manifesting an obvious intention by Congress to enter this field; that the Congress has in fact disclaimed any such purpose. And the Brotherhood further contends that if any doubt on this subject is gleaned from a reading of the Act itself, such doubt cannot be entertained by an impartial mind once a comprehensive understanding is acquired of the manner in which railroad employees are more or less constantly shifted from one craft to another because of the interrelated nature of the work performed by the two crafts, and the manner in which the processes of collective bargaining became adapted to this situation long prior to the enactment of the Railway Labor Act. To acquire this understanding, it is necessary to have a more comprehensive picture of this practice and of the established bar-

gaining procedure in the railroad industry than is provided by the petitioner's statement of the case.

The operation of railway locomotives requires, as everyone knows, the services of two crafts or classes of employees, to-wit, engineers and firemen. The training necessary for a man to serve efficiently as an engineer is customarily acquired by serving as a fireman. Hence, railroads usually acquire all, or a substantial majority, of their engineers from among their own craft of firemen. This is advantageous to the railroad and it is a plan favored by the employees, because it provides the firemen with an incentive for consistent and loyal service and they are, in turn, rewarded by the higher paid and choicer work available to them as engineers. Prior to the time that the Firemen's Brotherhood began acting as the representative of the firemen's craft, railroad management often selected firemen of their choice for promotion to engineers, without particular regard for qualifications. This practice has been eliminated through the efforts of the Firemen's Brotherhood by the adoption of agreements with all railroads generally throughout the country establishing a system of rules governing the terms and conditions under which men will be promoted from the firemen's craft into the engineers' craft in the order of their seniority as firemen (R. 282).

A railroad's need for engineers varies with fluctuations in traffic. As traffic increases, additional engineers are required, and as traffic decreases a surplus of engineers develops and something must be done with them. A man once employed as an engineer has no right, in the absence of contract, to return to work as a fireman in the event his services are no longer needed as an engineer. It is obviously undesirable for the railroad to lose the services of demoted engineers in their capacity as firemen. This problem was eliminated from virtually all railroads (it was eliminated from the M-K-T Railroad some forty-five years

ago) through agreements by the Firemen's and Engineers' Brotherhoods with the carriers establishing the terms and conditions under which furloughed engineers may return to work as firemen (R. 231). Furloughed engineers occupy, of course, a high position on the firemen's roster. They are, therefore, able to command the best of the firing jobs (R. 285).

The evil to the firemen's craft of this arrangement arises from the fact that at least *two* firemen are displaced by the reinstatement to firing of *one* furloughed engineer,—one of these being the fireman who is "bumped" to a lower position because his job was taken from him by the furloughed engineer, and the other being the fireman at the bottom of the firemen's working list who is forced out of a job as the "bumped" fireman exercises in turn his right to demand the job of some other fireman occupying a lower position than his own on the firemen's roster. This process may result in the displacement downward of many firemen. The transfer of a fireman to a job as engineer has a reverse effect on the firemen's craft. One fireman moves up to take the place of the man advanced to engineer, and this move permits other firemen of lesser seniority to advance in turn, with the end result that a furloughed fireman at the bottom of the list is recalled to work.

The extent of this shifting of men from the firemen's craft into the engineers' craft and their return to the firemen's craft is substantial. Evidence introduced by the Firemen's Brotherhood discloses that, as of January 15, 1941, a total of 321 men were working as engineers on the M-K-T Railroad, and 338 men were working as firemen and helpers. Of the latter group, 169 men, or *50%*, were *demoted engineers*. There were also 39 demoted engineers who were not firing because they had no seniority rights as firemen on the M-K-T Railroad, and *there were 99 firemen who were furloughed and out of work* (R. 227, 228-229). *Thus, one-half of all the employees working as fire-*

men were in the group that moved from one craft to the other.

There is no information of record as to what proportion of these 169 men were moving more or less frequently between the two crafts. But the fact that one-half of all the firemen employed on the M-K-T Railroad were demoted engineers, and that the qualified firemen on the seniority list who were furloughed and out of a job equalled approximately 30% of the total number of employed firemen, this at a time when the railroads of the country were enjoying an uncommon amount of traffic (1941), points up the relative magnitude of the problem created by this shift of employees from one craft to the other, and the demoralizing consequences it perforce has on the firemen at the lower end of the seniority roster. The seriousness of this situation to the firemen is further emphasized by the fact that this shifting from craft to craft continues for a long period of time, often from 25 to 30 years, before a promoted fireman is able to hold a steady job as engineer (R. 231).

The petitioner introduced testimony as to the employment situation on the M-K-T Railroad as of June 1, 1941. This information is to the effect that there was a total of 438 engineers on the engineers' roster, of which 348 were employed as engineers and 90 were demoted, the latter group presumably working as firemen. There may be a discrepancy between this and the firemen's data, but if we accept the petitioner's figures, even they reveal that in excess of 20% of the engineers are within the group that move from one craft to the other (R. 167-168).

One other significant fact is brought out by the firemen's data. This is that *84.6% of the 169 demoted engineers are members of the Firemen's Brotherhood.* There is, we suggest, more than a casual connection between this fact and this attempt of the Engineers' Brotherhood to gain control over the terms and conditions governing the transfer of these employees between the two crafts.

This interdependence of the two crafts has thus far generally been regulated in a manner designed to promote the welfare of both crafts and the carrier. It has been regulated by a set of rules and conditions that cover, in the main, three subjects. These subjects are, (1) the promotion of firemen to engineers, (2) the return of demoted engineers to work as firemen, and (3) the transfer of qualified engineers from work as firemen to work as engineers. By qualified firemen is meant either demoted engineers or newly promoted engineers.

A move to harmonize the rules and conditions governing these subjects on the railroads throughout the country began in 1913 when the Engineers' and Firemen's Brotherhoods acknowledged to each other their mutual concern with these subjects and reconciled their views by incorporating them into an agreement that has since been known as the Chicago Joint Agreement, made effective May 17, 1913 (R. 232, 233-237, 292). This agreement established, in addition to the rules and regulations on these subjects, a procedure for the submission by the general chairmen of the two organizations on the various railroads, of questions and disputes concerning the proper interpretation and application of the Agreement to the chief executives of the two Brotherhoods for their joint decision. More than a thousand of these decisions were rendered during the lifetime of the agreement. Among them are at least six decisions involving disputes that are precisely like two of the three disputes between the M-K-T Railroad and the Firemen's Brotherhood which were settled by the Mediation Agreement. The terms of the Mediation Agreement are consistent with these decisions rendered by the chief executives (R. 259-277, 292).

The efforts of the two Brotherhoods to promote uniform rules on these three subjects of joint concern to the two crafts were culminated by the incorporation of these rules from 1918 to 1920 into the engineers' and firemen's

schedules in effect on most of the railroads. They were incorporated in the engineers' and firemen's schedules on the defendant railroad as of October 1, 1918 (R. 278).

Article X of the Chicago Joint Agreement, as revised May 4, 1918, contains the rules governing the promotion of firemen (R. 238-243). These appear verbatim in Article 58 of the firemen's schedule (R. 220-224), and they appear in Article 43 of the engineers' schedule (R. 99-102). Article XI of the Chicago Joint Agreement contains the terms and conditions upon which demoted engineers may return to firing service, and must subsequently be removed from this service to work as engineers (R. 242-243). These appear verbatim in the firemen's schedule as Article 49 (R. 218-219), and in the engineers' schedule as Article 44 (R. 102-103).

The Chicago Joint Agreement remained in effect until cancelled at the instance of the Engineers' Brotherhood on October 1, 1927 (R. 255). Efforts were thereafter made by the Firemen's Brotherhood to reestablish the agreement, but without success (R. 278, 279). The provisions of the Chicago Joint Agreement incorporated in the engineers' and firemen's schedules on the M-K-T Railroad remain in both schedules to the present date (R. 278).

The Mediation Agreement of December 12, 1940.

Only brief comment is required in addition to the petitioner's statements on this subject.

Items 1 and 3 of the Mediation Agreement are concerned with the use of "emergency engineers." An emergency engineer is usually a demoted engineer, although he may in a rare instance be a newly promoted fireman. In either event, the man about whom this problem revolves is holding a regular assignment as a *fireman* at the time need arises for his services as an *emergency engineer* (R. 153). He returns to his regular firing assignment immediately after his run or job as an emergency engineer is

completed. His name is not added to the engineers' working lists.

As explained by the petitioner, the practice in effect at the time the Mediation Agreement was entered into, when need for an emergency engineer arose, was to call the senior demoted engineer then working as a fireman "whose home terminal was at the place where such service was required or required to begin," assuming that a demoted engineer was available at this place, and also assuming that another exception explained by the petitioner did not exist (Petitioner's brief, p. 6). The purpose of Item 1 of the Mediation Agreement was to reestablish on the M-K-T Railroad observance of the simple principle of seniority required by the rules found in Article 58 of the firemen's schedule and Article 43 of the engineers' schedule, derived, as previously explained, from the Chicago Joint Agreement, which entitles the oldest available demoted engineer within the seniority district to have the first opportunity available of returning to engineer service, whether that service be emergency or permanent (R. 280-282). The Engineers had departed some time previously from this principle and had succeeded in securing an agreement from the management of the M-K-T Railroad condoning this departure. *At bottom, the issue involved here was which of two men, both working as firemen, would be called to fill an emergency need for an engineer.*

Item 2 of the Mediation Agreement is, in reality, a rule of procedure. Back in 1923, four operating Brotherhoods, to-wit, the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brotherhood of Railroad Trainmen, had agreed that the working lists would be regulated by the M-K-T Railroad "in accordance with existing rules and agreements and rulings made by the general committees." (R. 30-31). These "existing rules and agreements," in so far as the engineers and firemen were concerned, were

the Chicago Joint Agreement and the joint decisions of the Brotherhoods' chief executives thereunder. Adjusting the working lists consists, so far as need be understood for the purpose of this case, of the process of moving firemen into the engineers' craft by placing them on the engineers' working lists, and of demoting engineers by removing them from the engineers' working lists and returning them to work as firemen. These changes are made for the purpose of keeping the mileage run by the engineers within the maximum and minimum limits prescribed by Article 44 of the engineers' schedule (R. 102-103), and Article 49 of the firemen's schedule (R. 218-219), both of which were, as we have already seen, derived from the Chicago Joint Agreement (R. 242-243). The M-K-T Railroad continued to handle the lists for some twelve or fourteen years after the agreement of March 28, 1923, but the Engineers' general chairman finally "drifted" into the habit of regulating the list alone (R. 286, 287). The Engineers do not challenge in this action the validity of the maximum-minimum limitations applicable to engineers. They are challenging the right of the M-K-T Railroad and the Firemen's Brotherhood to revitalize the agreement of March 28, 1923 (to which the Engineers' Brotherhood was a party), under which the task of adjusting the working lists was assumed by the carrier, subject to consultation with the interested general chairmen.

Item 3 of the Mediation Agreement was intended to correct a practice at Smithville, Texas, which, like the practice under Item 1, violated the fundamental requirements of the principle of seniority. An agreement had been made in 1929 by the petitioner with the M-K-T Railroad which permitted an engineer in a pool, when the turn of the man ahead on the pool list came up and he was unable or declined to take the run and there was no engineer available on the extra list, to move up and fill the vacancy. In this manner the engineers were able to make

extra miles and thus extra money. Prior to 1929, the need for an emergency engineer under these circumstances was met in the manner required by the principle of seniority, which was by calling the oldest available demoted engineer from firing service. Item 3 of the Mediation Agreement reestablished the practice that obtained prior to 1929.

The explanation advanced by the Engineers in justification of the unique practice at Smithville is as follows:

> "There was a special reason for having this exception to the general rule in effect at this point, as explained by the General Chairman, which was that there were so many regular engineers laying off at times when extra engineers were not available, resulting in the calling of emergency engineers, the regularly assigned engineers on the pool board were not making even the minimum mileage permitted by the schedule agreement; and it was found that, if all permissible mileage was worked by the assigned engineers, the working list could be maintained, or, in some instances, if the maximum mileage should be exceeded thereby, the list could be increased by the addition of another man. * * *" (Petitioner's brief, p. 54.)

It is true, of course, that the individual engineers in the pool who frequently laid off would thereby fail to run the maximum mileage allowed them by the rules. But the fact of the matter is that individual engineers who did not lay off made their maximum allowable mileage, and, when allowed to fill the vacancies created by the lay-offs, their normal good earnings were greatly swelled. The rule insisted on by the firemen merely required that vacancies be filled by the senior available demoted engineer, instead of their being filled by engineers already making their maximum allowable mileage under the rules. Under the firemen's rule the total mileage allotted to the pool remained unchanged; the only engineers in the pool who failed to make their normal mileage were those who elected to lay off, and to the extent that these lay-offs did occur the senior

available demoted engineer was accorded the opportunity due him under the principle of seniority as established by the schedules applicable to both crafts.

The fact should be borne in mind that none of the three rules comprising the Mediation Agreement regulates in the slightest degree the wages or working conditions applicable to engineers. *Items 1 and 3 have to do only with the selection of a man to perform emergency service as an engineer, and Item 2 is only a rule of procedure.* Each of these items constitutes, beyond the possibility of dispute, an integral part of the field or area of joint concern to both crafts which was covered by two of the three subjects comprising the Chicago Joint Agreement. A decision by the Court sustaining the validity of the Mediation Agreement would affirm the right of the Firemen's Brotherhood to bargain with the carrier on the subjects covered by the Chicago Joint Agreement. And a decision sustaining the right of the Firemen's Brotherhood in the latter respect must of necessity be equivalent to affirming the validity of the Mediation Agreement.

SUMMARY OF THE ARGUMENT.

The petitioner seeks by this action to have an agreement between the M-K-T Railroad and the Firemen's Brotherhood covering three items or subjects declared null and void. The action is predicated upon the ground that, by entering into this agreement, the respondents violated the rights bestowed by the Railway Labor Act upon the petitioner in its capacity as the exclusive representative of the engineers' craft.

This respondent contends, to the contrary, that it was acting, when it entered into the agreement with the M-K-T Railroad, as the representative of the firemen's craft, and was representing and protecting the interests of the firemen in matters that vitally affected the welfare of the firemen's craft, though such matters also concerned the

engineers' craft. These matters, generally speaking, are the terms and conditions governing the transfer of men between the two crafts, this transfer being essential and more or less continuous because of the fact that service as a fireman constitutes an apprenticeship in preparation for work as an engineer, and the further fact that furloughed engineers must, as a matter of good operating practice, be permitted to return to work as firemen when their services are not needed as engineers, owing to fluctuations in traffic. More specifically, two of the items in the agreement establish the conditions under which demoted engineers will be called from service as firemen to fulfill the carrier's need for emergency engineers. The other item in the agreement sets up a rule of procedure to be followed in the process of demoting engineers and returning them to work as firemen, and in recalling demoted engineers from service as firemen and putting them to work as engineers.

This respondent contends that the Railway Labor Act contains no provisions that were patently intended to establish exclusive bargaining jurisdictions, in addition to its obvious purpose of assuring that there shall be exclusive representation of crafts or classes of employees.

The items covered by the agreement between the two respondents have been the subject of negotiations and agreements between these parties since collective bargaining became an established procedure on the M-K-T Railroad more than forty years ago. The rules and conditions governing these subjects directly and vitally affect the earnings and the welfare of the firemen as a craft, and it is this respondent's view that only the most positive mandate from Congress should suffice as authority for this Court to deprive the firemen's craft of the right to have its interests represented and protected in negotiations with the M-K-T Railroad in matters such as are covered by the agreement between these parties.

The agreement between these parties was fostered and promoted by the National Mediation Board, and was subscribed to by two of the members of the Board. In performing this mediatory service, the Board was functioning as the administrator of the "bargaining provisions" of the Railway Labor Act, and the resulting Mediation Agreement is entitled to a strong presumption of validity.

ARGUMENT.

Questions Propounded by This Court.

Counsel in this and other related cases have been requested by the Court to discuss certain questions "so far as applicable in each case." Only the first two questions appear applicable to the instant case.

1. The appropriateness of declaratory judgment procedure in this case. Subject to the views hereinafter expressed concerning federal jurisdiction of this action, this respondent finds no reason to qualify or dissent from the petitioner's conclusion relative to the question whether resort to declaratory judgment procedure is appropriate in this case.

2. Are questions as to the construction of the contract involved in this action governed by state or federal law? In considering this question, we begin by saying that there is no dispute between the parties as to the proper construction or application of the Mediation Agreement. Its meaning and intended application are understood alike by all parties.

The question propounded by the Court is so phrased as to suggest that the Court desires to know whether the issue concerning the validity of the Mediation Agreement really and substantially involves a federal question. On this point, this respondent takes the position that the petitioner's amended complaint does *not* present a substantial

federal question upon which may be founded federal jurisdiction of this action.

This Court has repeatedly affirmed the following statement of the law on this question:

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit." (*Binderup v. Pathe Exchange*, 263 U. S. 291, 305 (1923). See also, *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103 (1933); *The Fair v. Kohler Die and Specialty Co.*, 228 U. S. 22 (1913).)

A plaintiff, in undertaking to state a cause of action, may point to a federal statute as the source of the right which he seeks to enforce. If the statute purports to confer the right asserted, but the right is qualified or its exercise conditioned so as to place in doubt the propriety of the plaintiff's action, the action may, according to our understanding of this rule, fail on the merits, but the complaint will in all events present a substantial federal question. On the other hand, if an examination of the statute discloses no legislative treatment of the right asserted, or if the statute clearly negatives the existence of the right, the plaintiff's claim is said to be "plainly without color of merit," and the federal question is characterized as "unsubstantial."

On this understanding of the practical operation of the above quoted rule, this respondent submits that the petitioner's complaint does not present a substantial federal question.

An examination of the Railway Labor Act discloses no language or declared purpose evidencing an intention on the part of Congress to legislate on the subject of jurisdictional disputes between labor organizations or crafts of employees. The specific provisions of the Act relied upon by the petitioner as the source of the exclusive bargaining authority asserted in this action are simple, unambiguous provisions directed to other subjects and not designed to accomplish the objects sought by the plaintiff. This conclusion was subscribed to by the Circuit Court of Appeals, when it said:

> "The Railway Labor Act does not undertake to say what matters shall be considered the business of each particular craft. It does not define the crafts or classes of employees, and forbids any effect to be given classifications made for other purposes by the Interstate Commerce Commission; Section 151, Fifth." (132 F. 2d 91, 94.)

A detailed discussion of the "bargaining" provisions of the Railway Labor Act appears later in the Argument. We think it unnecessary to repeat that material here. But on the basis of this later analysis of the Act, and the foregoing views, this respondent submits that the federal question presented by the petitioner's First Amended Complaint is unsubstantial and inadequate as a basis of federal jurisdiction.

The Terms of the Railway Labor Act Do Not Authorize, And Its Purposes Do Not Justify, This Action.

This action is predicated upon implications derived from certain provisions of the Railway Labor Act,—implications which are being projected to their logical extremities, but which are not justified by the plain language of the Act. This action, if successful, will make of the Railway Labor Act a device for the aggrandizement of one union and the craft it represents, through the process of denying to another craft the means of protecting and promoting its own interests through competition with the former craft.

That these results will follow this perversion of the Railway Labor Act—indeed, that the Engineers' Brotherhood intends that they shall follow—must become apparent to anyone acquiring an understanding of the interrelation of the engineers' and firemen's crafts in normal railroad operation and the forces at play within these crafts. Once having acquired an understanding of this interrelation and these forces, there will remain for this Court only the question whether the Railway Labor Act must or should be lent to the accomplishment of these untoward results.

An explanation in considerable detail was made earlier in the Statement of the Case, of the mutual advantages that accrue to each craft, and to the carrier, if the shifting of employees between the two crafts is permitted under terms and conditions that require each craft to contribute to the welfare of the other, but which, at the same time, place neither craft at the mercy of the other. It was explained that the opportunity of working as an engineer is striven for by an employee from the time he begins work as a fireman because of the advantages if offers in terms of pay, conditions of work and prestige of the position. Entrance into the craft of engineers involves long years of effort as a fireman, and much study and preparation is required in order to meet the tests and qualifications that con-

dition entrance into the engineers' craft. These considerations led the Firemen's Brotherhood to establish, through agreements that have long since been in effect on virtually all the railroads of the country, a system of rules and regulations governing the promotion of firemen into the engineers' craft. An opportunity for promotion is now assured the firemen under these rules in the order of their seniority as firemen. In fact, firemen are compelled in their proper turn to qualify for promotion to engineer, or be dismissed from the service of the carrier. This is done to prevent firemen, after reaching the upper regions of the firemen's roster, from "roosting" there, to the prejudice of the younger firemen and the quality of material available for promotion into the engineers' craft.

It was further explained that the periodic, sometimes daily, fluctuation in traffic has the effect of unstabilizing the quota of engineers needed by a railroad. This circumstance created a problem for both crafts, for it meant unemployment at times for a substantial percentage of the engineers, particularly in the regions of the country where traffic was highly seasonal, unless they could return to work as firemen. And if they were returned to firing, it meant hardship for the regular firemen, not only because the furloughed engineers could command on the basis of seniority the choicest of the firing jobs, but also because each furloughed engineer who returned to firing forced one regular fireman at the bottom of the roster out of a job entirely, and displaced the remaining firemen one position downward on the firemen's working lists.

This problem, in turn, created a third problem for the two crafts, for with the firemen's craft undertaking to bear the hardships incident to serving as a buffer for the periodic unemployment occurring in the engineers' craft, the terms and conditions under which demoted engineers would be removed from firing and returned to work as engineers became, naturally enough, an issue between the two crafts.

These three problems were resolved from 1913 to 1927 by a compromise of interests that took the form of the Chicago Joint Agreement between the two Brotherhoods. By this Agreement, the members of the two crafts and the two Brotherhoods composed their differences on these subjects, and the two chief executives issued a tremendous number of joint opinions designed to promote the uniform application on the railroads throughout the country of the terms of the Chicago Joint Agreement, which had, in the meantime, been incorporated by agreement with the carriers in the engineers' and firemen's schedules on most of the railroads. This period of relations in which the two crafts sought to meet their joint problems by joint action, through agreement and compromise, was brought to an end at the instance of the Engineers' Brotherhood on October 1, 1927.

No perspicacity is required by anyone having a fair understanding of the foregoing facts and history, to recognize where the interests of the engineers' craft lie in this field of conflicting interests between the two crafts. *They lie in the employment at all times of as few engineers as possible.* That is to say, the constant objective of the engineers' craft and its representative is to spread the work available to the engineers' craft among as *few* engineers as possible. The attainment of this objective requires an advancement of the maximum mileage limitations that have been applicable to engineers, or the elimination of these limitations altogether from the rules. To attain their objective, engineers should be removed from the engineers' working lists promptly with decreases in traffic, and demoted engineers should be returned to the engineers' working lists only upon clear demonstration that the current force of engineers is unable to absorb the work available to them. Operation under these principles would be the means by which the most lucrative and desirable employ-

ment available on a railroad could be divided among, and be enjoyed by, the fewest.

The complete attainment of this objective of the engineers' craft has, however, thus far been prevented through the competition provided by the firemen's craft. For it is to the interest and welfare of the firemen's craft that the carrier be induced to support principles directly opposed to those championed by the engineers' craft. The firemen want to be assured that their entrance into the engineers' craft will not be governed by the whim or personal choice of a third party. They want to be assured that this entrance will be orderly, in accordance with their seniority as firemen, and that these terms and conditions will be protected through the efforts of their representative. They want the lucrative and desirable work of the engineer to be made available to as large a number of men as possible, consistent with the maintenance of a reasonable individual income. They want the engineers' craft to bear as much of the burden of its own unemployment as can feasibly be done. To accomplish this requires the observance of minimum mileage limitations by the engineers, to which limits the mileage averaged by the engineers must be allowed to drop before any engineer will be furloughed and returned to firing. And it requires the observance of maximum mileage limitations above which the average may not arise without demoted engineers being recalled to service.

There are thus in play at all times opposing forces between the two crafts. Each craft bids for the carrier's endorsement of such rules and regulations as will promote its fundamental objective in these respects. The fruit of this competition has generally been a compromise of views by the contestants. The carrier has been able to take a moderate, middle-of-the-road course between the extremes that either of these two forces might otherwise force it to

subscribe to, if left unbalanced by the elimination of one of them.

If the petitioner succeeds, through the approbation of this Court, in establishing its hypothesis as a reality, the engineers' craft and its representative will henceforth be freed from the scourge of competition in a field which they, for nearly forty years, have been forced to share with the firemen's representative. They will have acquired exclusive bargaining jurisdiction in this field. Their economic power, which in the past has been insufficient to enable them to dominate this field, will have been buttressed by a statutory grant of monopolistic power. There will henceforth be only the carrier for them to contest with. The firemen's representative will be denied the right to be heard on these three subjects which control to a substantial degree the welfare of the firemen's craft, and about which it has assumed without question from any quarter to bargain with the carriers since collective bargaining became an established practice in the railroad industry.

These are the consequences which the petitioner would have this Court generate through the adoption of its "construction" of the Railway Labor Act.

It is the respondent's contention that the Act contains no language nor expressed purpose that would justify such consequences, and, furthermore, that only the most unequivocal command by Congress should suffice to induce this Court to deny to the employees constituting the firemen's crafts on the railroads of the country, the opportunity of being heard through their representatives for the protection of their interests in this field of joint concern to both crafts.

The Terms of the Railway Labor Act Relied Upon by the Petitioner Have No Apparent Bearing Upon Jurisdictional Disputes Between Labor Organizations or the Crafts Represented by Them.

Let us examine the process by which the petitioner's theory of exclusive representation is derived from the Railway Labor Act. It begins with Section 2, Fourth, of the Act, which provides that "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." This is, of course, nothing more or less than a legislative affirmation of the principle of collective bargaining.

The second step is the succeeding sentence in Section 2, Fourth, which reads, "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." This provision was designed to eliminate the undemocratic control of a craft or class by a labor union representing only an organized minority. Majority rule, without regard for union affiliation, thus became the established rule. This becomes evident by a reading of Section 2, Third, of the Railway Labor Act as enacted in 1926 (44 Stat. 578), which is the precedent for Section 2, Fourth, of the Act as amended in 1934. It reads as follows:

> "Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

The petitioner, in the further development of its theory, points to Section 2, First, which declares that it shall be the duty of carriers and their employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions," and

then there follows the admonition in Section 2, Ninth, to carriers to treat with the certified representative "as the representative of the craft or class for the purposes of this Act,"

From this Congressional plan for collective bargaining through certified representatives chosen by the majority of the employees within a craft or class, the petitioner derives implications of a scheme for the statutory elimination of all jurisdictional disputes between labor unions or the crafts they represent. How this is done is explained by the petitioner in one sentence of its brief, as follows:

> "The reasons which support and justify the holding that the right of majority craft representation is exclusive are equally persuasive that it was the intent of Congress in enacting the Railway Labor Act to restrict the 'rules and working conditions' concerning which the craft, through its representative, has the right to contract" (Brief, pp. 45-46).

There it is in a nutshell. If the Congress had reasons that justified permitting a craft or class of employees to have only one representative, that is, justified exclusive representation of a craft or class, then, the petitioner reasons, "*it is equally persuasive that it was the intent of Congress*" (though Congress didn't say so) *to also prescribe exclusive fields of bargaining jurisdiction.* In short, the idea is that if Congress thought exclusive representation of a craft or class would be a good thing, then it ought also to be a good thing to divide the legitimate subjects of collective bargaining between carriers and their employees into divisions or groups of subjects and make of each of these an exclusive field of bargaining by one representative. The petitioner assumes to legitimize its proposal by pointing to the goal of industrial peace. It explains:

> "If the designated representative of each particular craft does not have the exclusive right to bargain with the Carrier within definable limits, and if the jurisdiction of a craft within which the exclusive right

may be exercised is not limited, then disputes between various crafts will result in defeating the express purposes of the Act. * * * Dual representation of any kind will render the Act ineffective. When Congress adopted the 1934 amendments of the Railway Labor Act and established majority rule for crafts for the purposes of the Act, we submit dual representation of all kinds was eliminated from railroad labor relations." (Brief, p. 46)

In weighing the petitioner's proposal, we suggest that three items in particular should be kept in mind by the Court.

First, Congress has specifically denied any intention of legislating on the powers or jurisdiction of railway labor organizations. Its disclaimer of regulation on this subject is contained in Section 1, Fifth, of the Act, and reads as follows:

"The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, *nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.*" (Italics ours)

Congress has thus declared that the *jurisdiction or powers* of labor unions organized or joined by crafts of employees are not to be regarded as "*in any way limited*

or defined by the provisions of this Act." By *jurisdiction or powers*, the Congress must of necessity have meant the *subject matter or field* with respect to which a labor organization representing a craft of employees would normally assume to bargain on behalf of the craft. Sometimes the crafts or groups of employees which a labor organization assumes to represent or include within its constituency are referred to as the union's "jurisdiction." But this cannot be the sense in which the word jurisdiction is used in Section 1, Fifth, because the union's jurisdiction or powers is referred to in the sentence as something different from, or in addition to, the employees that may be combined within one craft and represented by one representative. So Congress must have intended by this provision to disclaim doing precisely the thing which the petitioner contends it did do in this instance, to-wit, limit the bargaining jurisdiction of the Firemen's Brotherhood.

Second, the petitioner's proposal takes no account of the fact that the rules or regulations governing one subject may directly affect or control the earnings or working conditions of two or more crafts, either in similar or in diverse ways. The petitioner proposes to ignore realities. It would deny to one craft or class the right to protect its vital interests, and would place the welfare of that craft or class at the mercy of another craft having opposing interests, itself in this instance.

Third, the petitioner's own explanation of the origin of its hypothesis acknowledges that it is not spelled out in the Railway Labor Act. It admits that Congress did not declare in specific language that there were to be exclusive areas of bargaining jurisdiction covering *all* the "wages, rules, and working conditions" pertaining to each of the several crafts or classes of employees serving a carrier. It only says that there are reasons which are *persuasive* of the belief that it was the *intent* of Congress to define jurisdictional boundaries.

We are reminded of the *caveat* expressed by this Court, when urged by another petitioner under similar circumstances to discover meaning when it had not been articulated by the Congress, in the following language:

> "And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself." (*Palmer v. Commonwealth of Mass.*, 308 U. S. 79 (1939).)

The Means by Which the Petitioner Seeks to Attain Its Ends Are Contrary to the Principle Underlying the Railway Labor Act.

The principle underlying the Railway Labor Act is the avoidance of industrial warfare through the airing of grievances by their discussion around the conference table. By this process it is anticipated that tolerance, understanding, compromise and ultimate agreement will supplant strikes and lockouts.

The petitioner, in contrast to this principle, proposes that "peace" between the engineers' craft, the firemen's craft and the M-K-T Railroad be attained by precisely the opposite procedure, to-wit, by suppressing the right of the firemen's craft to have its interests represented and its grievances aired in connection with matters that vitally affect its welfare. Perhaps it was a distrust of the principle relied upon by Congress for the successful operation of the Railway Labor Act, that caused the Engineers' Brotherhood to disdain the efforts of the National Mediation Board and of the M-K-T Railroad in 1940 to have it participate in the conferences between the Firemen's Brotherhood and the M-K-T Railroad for the purpose of

composing the differences that resulted in the Mediation Agreement, and spawned this litigation (R. 161, 163, 164).

It is significant in this connection to remember that collective bargaining was an established institution in the railroad industry when the Railway Labor Act was first enacted. As stated in the picturesque language used by Judge Atwell, before whom this case was originally heard in the United States District Court for the Northern District of Texas:

> "There is another, I think a very strong reason for this all-inclusive settling act, with reference to railroads. As has already been said in argument, it did not enter a new field, the field was already known, it was already fallow, it was already plowed, it had been harvested, everything, every marker, every bearing was known in that field, all the soil was known, all the seasons that play upon it, all the crops that spring from it, of both discord and unity, everything was known that is now known with reference to these controversies; and we cannot say that there is anything not included in the Act." (R. 75)

The Railway Labor Act did bring to the field of employer-employee relations in the railroad industry, as something new, the conciliation and mediatory services of the National Mediation Board, the adjustment processes of the National Railroad Adjustment Board, and a statutory plan of arbitration. But to collective bargaining itself, the Act did little more than formally legalize an existing institution, and buttress it with certain procedural restrictions and conditions (Sec. 2, Sixth, and Seventh; Sec. 6).

The net effect of these latter provisions was to impose as a duty on *all* carriers alike the procedure of collective bargaining which had previously been undertaken voluntarily by most carriers prior to the enactment of the Act. It assured to the employees of all carriers complete independence from the carrier and freedom of action in the selection of a representative, and it assured to the em-

ployees' representative an opportunty of meeting with the representative of the carrier and having their demands or grievances discussed and considered.

There was henceforth to be no repetition of the tactics of reactionary management, such as were indulged in by the defendants in *Texas & New Orleans R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548 (1930), and *Virginian R. Co. v. System Federation No. 40*, 300 U. S. 515 (1937). In each of these instances the defendant carrier had sought to interfere with the right of its employees to organize, or to designate, an independent labor organization to act as their representative. It had done this by undertaking to foster a rival "independent" association among its employees, and by refusing to recognize and bargain with the representative that had been demonstrated to be the choice of a majority of its employees. It was to this state of affairs that this Court was addressing itself when it so correctly declared the duty of the carrier, in the latter case, to be as follows:

> "The obligation imposed on the employer by section 2, Ninth (45 U. S. C. A., Sec. 152, subd. 9), to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the act, and of the provisions of section 2, Third and Fourth (45 U. S. C. A., Sec. 152, subds. 3, 4), giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other."

This Court could not, in the opinion of this respondent, have more appropriately declared the duty of a carrier toward its employees and their representative under the circumstances obtaining in these cases than it did in this instance. We are equally confident that it would be a misapplication of principle and a perversion of language to

point, as the petitioner does, to the above quotation as the rule that should govern the disposition of the instant case.

Here there has been no interference with the designation of the petitioner as the representative of the engineers' craft. There has been no interference by either the M-K-T Railroad or this respondent with the petitioner's performance of its obligations as the representative of the engineers' craft. *In entering into the Mediation Agreement the Firemen's Brotherhood did not assume to represent or act on behalf of the engineers' craft in the least degree.* What it did in this respect was done solely on behalf of the firemen's craft, though, admittedly, consequences flowed from its acts that affected the engineers.

The engineers' craft has had every opportunity contemplated by the Railway Labor Act to choose its representative, and to be represented by it in all matters affecting the craft. Every desired opportunity for conferences, the presentation of views, and the representation of interests were accorded both Brotherhoods by the M-K-T Railroad and the National Mediation Board during the long period of negotiations preceding the execution of the Mediation Agreement.

In short, the processes prescribed by the Railway Labor Act and the duties declared by this Court in the *Virginian* case have been adhered to, both in their letter and spirit, by all parties throughout the whole of this controversy, with the exception of the refusal of the Engineers' Brotherhood to participate in the three-party conferences proposed by the M-K-T Railroad and by the National Mediation Board.

We suggest that the petitioner's grievance, represented by this action, has been improperly directed against the M-K-T Railroad. Its grievance should lie, instead, against the Congress for having embraced, when it enacted the Railway Labor Act, the principle that open and

frank discussion of grievances by carriers with their employees is the surest and most direct road to industrial peace. The Congress declared this to be the principle underlying the Act when it said:

> "*All disputes* between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and *by the employees thereof interested in the dispute.*" (Sec. 2, Ninth, Railway Labor Act) (Italics ours.)

The wisdom of this principle was affirmed by the Circuit Court of Appeals for the Fifth Circuit when it rejected the petitioner's demand that the right of the Firemen's Brotherhood to be heard and to bargain on matters of vital concern to the firemen's craft be suppressed, and expressed its views as follows:

> "The statute (Railway Labor Act) thus recognizes, what is the practical truth, that no conference or agreement will end a dispute unless all who are really interested are represented. The most bitter and perhaps the most numerous industrial disputes have come to be those in which classes of employees dispute with their employer and one another over who has the right to control a particular matter; the so-called jurisdictional disputes. Regardless of who may be right or wrong, such a dispute can be settled justly only by a tri-partite agreement. This is true of the present dispute." (132 F. 2d 91, 94)

Thus, in terms indicative of strong conviction did the Circuit Court disapprove of the plan now proposed by the petitioner as the route to industrial peace.

In this connection, we suggest that the idea that industrial peace would be realized, or even promoted in the slightest degree, by vesting in the Engineers' Brotherhood the exclusive privileges sought by them is wholly fanciful. Imagine the state of relations between the members of the

engineers' craft and the firemen's craft that would inevitably develop if the latter were enjoined to stand silently by while the representative of the engineers' craft proceeded to extract from the carrier agreements covering the three subjects of joint concern to both crafts, establishing rules and conditions that advantaged the engineers' craft and neglected the welfare of the firemen's craft? The only conceivable weapon by which the firemen's craft could combat such a move would be its theoretical right to prevent furloughed engineers from returning to firing. But no one could fail to anticipate the violent opposition that a carrier would justifiably exert against a move of this character. The ill feelings and desperation that this new state of relations would engender in all three parties would, to put it mildly, fall considerably short of that state of harmony that Congress undoubtedly wistfully hoped for as the fruit of its enactment. This goal of industrial peace professedly sought by the Engineers' Brotherhood as the object of this litigation, deserves to be questioned. We think it appropriate to recall the acrid observation of Chief Justice Hughes when he said:

> "Motive is a persuasive interpreter of equivocal conduct, and the petitioners are not entitled to complain because their activities were viewed in the light of manifest interest and purpose." (*Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks*, 281 U. S. 548, 559.)

The Decision by the Circuit Court of Appeals Was Consistent With the Railway Labor Act.

The Circuit Court of Appeals held in this case that the only manner in which jurisdictional disputes or craft conflicts, such as the instant one, can ultimately be settled is by compromise and agreement between the parties. It summarized its opinion as to the validity and effect of the Mediation Agreement in the following manner:

"We cannot say the agreement thus reached violated any law and is void, but it is incomplete. The engineers are not bound by it, and the carrier is not protected against the discontent of the engineers, and the peace of transportation is not secured. The contending parties would now perhaps most wisely seek a new negotiation participated in by all. If no agreement can be had, the carrier will be left free to revoke all agreements on this subject as provided by the Act, Sect. 156, and may make its own rules." (132 F. 2d 91, 94)

The Court thus declared that the Mediation Agreement was a lawful undertaking between the M-K-T Railroad and the Firemen's Brotherhood. In saying that the agreement is "incomplete," that the engineers are not bound by it, and that the carrier is free to "revoke" the agreement under Sec. 156 (Sec. 6) of the Railway Labor Act, we understand the Court to mean that while the agreement remains in effect and is not withdrawn from by the carrier in the manner prescribed by Sec. 6 of the Railway Labor Act, it is a valid and binding obligation on the M-K-T Railroad and the Firemen's Brotherhood. But the Engineers' Brotherhood is not precluded during its existence from inducing, or attempting to induce, the M-K-T Railroad to enter into another and different agreement with it covering the same subject matter. That is to say, unless, and until, a tri-partite agreement is consummated between the M-K-T Railroad and the two Brotherhoods on this subject matter, the *continuing right* of any craft of employees subject to the Railway Labor Act, having a grievance, to seek conferences with the carrier and to dispose of the grievances through agreement with the carrier, precludes the carrier and one Brotherhood from placing the cause of the grievance, by agreement or otherwise, beyond the reach or efforts of the other Brotherhood to dispose of the grievance by another and different agreement.

If our understanding of the Circuit Court's decision in this respect is correct, and we are confident that it is, then the Court's decision is, we submit, consistent with the Railway Labor Act, and it should be sustained by this Court.

The Subjects of Joint Concern to Both the Engineers' and Firemen's Crafts Are, by Their Nature, Limited to a Few Subjects.

The petitioner devotes some space in its brief to making the point that if the Mediation Agreement is a valid agreement because of the fact that the firemen's craft has an *interest* in the subject matter of the agreement, then it would be consistent to permit the firemen's representative to negotiate agreements with the M-K-T Railroad on virtually all the subjects covered by the more than seventy-seven Articles comprising the engineers' schedule of wages, rules, and working conditions in effect on that railroad (Plaintiff's Ex. No. 1; R. 96, 97-104). This is said to be true because the firemen, as companion employees to the engineers, or as potential engineers destined to some day "inherit" the working conditions established by the engineers' schedule, have an "interest" in the merits of these rules.

We decline to believe that so far-fetched an argument is advanced in seriousness. The subjects or items directly affecting the prosperity and welfare of both crafts, and with respect to which the firemen's craft has traditionally assumed to negotiate and bargain with all carriers generally, have been limited to three in number. These are, as we have said, (1) the entrance of firemen into the engineers' craft through promotion; (2) the terms and conditions under which furloughed engineers will be returned to firing service, and (3) the terms and conditions under which furloughed engineers will be removed from firing service and

returned to work as engineers. This fact is understood equally well by all parties concerned. The three items comprising the Mediation Agreement are, as we have previously pointed out, integral parts of these subjects. There is not one word or suggestion in the record of the negotiations between the Firemen's Brotherhood and the M-K-T Railroad preceding the institution of this suit, or in the record of the relations between the two Brotherhoods, indicating a purpose or intent on the part of the firemen's craft to concern itself with the wages, rules, or working conditions pertaining to the engineers' craft, except as they may be affected or influenced by the terms and conditions governing these three subjects.

As we have already pointed out, the Chicago Joint Agreement, in so far as it pertained to rules governing the employment of engineers and firemen, covered only three subjects. We think the mutually-agreed jurisdictional spheres of the two Brotherhoods, *as set forth in the introductory article to the Chicago Joint Agreement*, reflect significantly upon the position taken by the Engineers' Brotherhood in this litigation, and especially on the argument that the firemen have an "interest" in all of the engineers' rules and working conditions.

The two Brotherhoods first agreed in this introductory article that "the right to *make* and interpret *contracts, rules, rates and working agreements for locomotive engineers shall be vested in the regularly constituted committee of the Brotherhood of Locomotive Engineers.*" They next agreed that "the right to *make* and interpret *contracts, rules, rates and working agreements for locomotive firemen shall be vested in the Brotherhood of Locomotive Firemen and Enginemen*" (R. 233, 237, 244). *They then proceeded to jointly establish the terms and conditions that were to govern the movement of employees between the two crafts, that is, the terms and conditions governing the three subjects that jointly concerned the two crafts.* And these

terms and conditions were thereafter incorporated, by agreement with the carriers, into their respective schedules in effect on all railroads generally.

The implication to be derived from these facts is clear. It is that the three subjects covered by the terms and conditions agreed upon in the Chicago Joint Agreement were not considered by the Engineers' Brotherhood in 1913, nor in 1918, nor in 1923, as constituting a part of the "rules, rates, and working agreements" that normally belong to the exclusive bargaining jurisdiction of the Engineers' Brotherhood. Any other conclusion than this drawn from these facts would not be consistent with normal human conduct, for men do not normally belie through deeds the principles which they, in the preceding moment, professed adherence to in words.

Yet in the face of this record of admission that there are fields of exclusive jurisdiction belonging to each of the two Brotherhoods and also a field of joint interest or overlapping jurisdiction, the Engineers' Brotherhood now takes the stand that the "rates of pay, rules, and working conditions" which are naturally and normally within the exclusive bargaining jurisdiction of the engineers' representative *include* the terms and conditions governing the three subjects covered by the Chicago Joint Agreement.

The *interest* of the firemen's craft in the subject of promotion of firemen, the return of demoted engineers to firing, and their subsequent reemployment in engineer work, is not an intangible, nor an indirect or future interest as the petitioner seeks to characterize it. The firemen's interest in these subjects is *direct*, *immediate* and *financial*. It is direct because the certain and inevitable consequence to the firemen is a lowering of their positions on the working lists through the process of "bumping" whenever an engineer is demoted, or an improvement of their positions on the working lists whenever a demoted engineer is returned to work as an engineer. Their interest is *imme-*

diate, not future, for these rules determine whether or not a fireman will presently be "bumped" because an engineer has been furloughed and is demanding his job; or whether, as in the case of the rules covered by the Mediation Agreement, a demoted engineer working as a fireman will presently be allowed to work as an emergency engineer, or whether that job will instead be given to an engineer to swell the latter's mileage. The interest is *financial* because these rules determine to a substantial degree the relative position that the firemen, as distinguished from demoted engineers, occupy on the firemen's working lists, or, as in the Mediation Agreement, determine whether a man shall earn the wages of a fireman or the wages of an engineer.

The Position Taken by the Carrier In This Controversy.

The petitioner seeks to attach considerable significance to the opinions expressed by the Vice-President and General Manager of the M-K-T Railroad during the course of the negotiations preceding the execution of the Mediation Agreement (Petitioner's brief, pp. 15-19, 60-63). During these negotiations, this officer expressed opinions in line with the views here urged by the petitioner, but he later abandoned the position he had taken because, the petitioner contends, of the firemen's threat of a strike if he did not come to an agreement with them.

We believe that the position taken by the carrier in respect to its right to enter into the Mediation Agreement with the Firemen's Brotherhood should be recognized by this Court as a fact of significance in deciding this case. We therefore take occasion to point out the misconceived notions of the petitioner as to the position taken by the M-K-T Railroad.

First, the views expressed by the Vice-President and General Manager, as to the bargaining jurisdiction of the

two crafts or of their respective representatives under the Railway Labor Act, were the views of a layman.

Second, the considered position taken by the M-K-T Railroad in this litigation is succinctly stated in paragraph 7 of its Answer, as follows:

> "These defendants deny that said Mediation Agreement is an unlawful interference with the rights of said craft of engineers to negotiate exclusively through its designated representatives with respect to rules and working conditions governing said craft or class, and deny that it is an unlawful interference with the rights of said craft or class to have rules and working conditions governing it determined by its representatives." (R. 51)

Third, after extensive and repeated efforts on cross-examination, the most that the petitioner was able to elicit from the Vice-President and General Manager was an admission that the firemen's threat of a strike "*might have influenced me a little*" in abandoning the contention that the Firemen's Brotherhood, in seeking an agreement on the items covered by the Mediation Agreement, was invading the exclusive bargaining jurisdiction belonging to the Engineers' Brotherhood (R. 201). As a matter of fact, the real and substantial cause of the Vice-President's change of position, as explained by him on cross examination, was the conviction that if he did not voluntarily come to an agreement with the Firemen's Brotherhood on terms such as were incorporated in the Mediation Agreement (which represented a compromise), the Firemen's Brotherhood would continue to insist on the more drastic rules requested in its original notice to the M-K-T Railroad (R. 208). The dispute would probably have ultimately reached a "fact finding committee, or emergency board," and if this occurred the Vice-President feared that the requests of the firemen's Brotherhood would be sustained, at least in part. This would constitute a refutation of the

Vice-President's position, and the establishment of a rule or rules that would operate, on occasions, in a manner to penalize the M-K-T Railroad. He therefore deemed it expedient to abandon his position, and consent to the terms of the Mediation Agreement (R. 199-201).

We submit that one cannot read objectively the Vice-President's explanation of the negotiations preceding the Mediation Agreement, elicited by the petitioner on cross-examination, without acquiring the conviction that the views advanced by this officer during this period represented not so much a firm conviction as to the meaning of the Railway Labor Act, as it did an element useful in strategic bargaining. They were advanced, we believe, with no thought in mind that they might become permanent principles under which the Engineers' Brotherhood would acquire monopolistic bargaining rights over these subjects. When possibilities of this character did become evident by the institution of this suit, the carrier took a position, as we have seen, adverse to the engineers' contention.

The National Mediation Board's Administration of the Railway Labor Act Is Opposed to the Petitioner's Contentions.

The M-K-T Railroad and the Firemen's Brotherhood were brought together and their differences reconciled through the mediatory efforts and influence of the National Mediation Board. The resulting agreement of December 12, 1940 was promoted and sanctioned by the Board as a *lawful* disposition of the dispute prevailing between these two parties.

The Board occupies the status of "an independent agency in the executive branch of the Government" (Railway Labor Act, Section 4; First). The Board functions, in a substantial sense, as an administrator of the collective bargaining provisions of the Act: It has the duty, among

others, when a "dispute concerning changes in rates of pay, rules, or working conditions (is) not adjusted by the parties in conference," "to put itself in communication with the parties to the controversy," and "use its best efforts, by mediation, to bring them to agreement." In discharging its duties in this respect, it goes without saying that any agreement it fosters and ultimately approves as a proper disposition of the controversy is presumably a valid agreement, consistent with the Railway Labor Act. The Board and its staff of aids and advisers must be assumed to be experts in the field of railroad-employee relations. They can be assumed to know the history of collective bargaining in this field, the forces at work, and the language and purposes of the Railway Labor Act.

It is an accepted rule of this Court that the proper interpretation and application of a law "drawn to meet the needs of a major occupation" must be discovered by consulting its environment and its purposes. *United States v. Am. Trucking Ass'ns.*, 310 U. S. 534, 543 (1940); *Southland Gasoline Co. v. Bayley*, 319 U. S. 44 (1943). There is perhaps no agency in the executive branch of the federal government better qualified in a manner consistent with this rule, to arrive at the proper interpretation and application of those portions of the Act under its administration, than is the National Mediation Board.

It should then, we believe, be recognized by this Court as a highly influential fact bearing upon the validity of the Mediation Agreement, that it was promoted and formally subscribed to by the National Mediation Board (R. 28).

CONCLUSION.

The Engineers' Brotherhood seeks by this action to acquire complete and exclusive bargaining authority over the subjects covered by the Mediation Agreement and the field of collective bargaining of which these subjects are a part. This field is claimed by the Engineers' Brother-

hood as one naturally subject to control by the engineers' craft, and one that the Railway Labor Act has placed within the exclusive bargaining jurisdiction of the Engineers' Brotherhood.

The District Court had the advantage afforded by trial procedure of becoming acquainted with all of the details of fact as well as the law involved in this action. The decision of the District Court on this claim of the Engineers' Brotherhood is summarized by the following quotation from its opinion:

> "If we take another step, we have a case clearly in territory that is not 'no man's', but a territory that belongs to two men. It is an overlapping territory. It is a territory in which both the Third Party defendant and the plaintiff have a right to tread, and have a right to treat, and have a right to contract concerning. *There cannot be any controversy about that; no just eye can look at it in any other way.*
>
> "The demotion of a fireman, the demotion of an engineman, the promotion of a fireman, or the promotion of an engineer, after demotion, the increase of the engineers' rank, the rotating downward of potential engineers, known as firemen, the one gravitating to the other, and the other gravitating to the one, interchangeably operating; friends working together in the same cab, on the same engine, are so close and so constantly passing from one territory to the other, that both have a right under the statute to act. And I think that the defendant had a right to bargain with the Firemen and Enginemen with reference to the matter that effected that particular craft. I am sure that the defendant would have had a right to have bargained with the engineers with reference to anything that affected that particular two-man territory, that overlapped, or overlapping territory, or, that territory that belonged to both. See *Virginian Ry. Co. v. System Federation*, 300 U. S. 515. *And, it seems to me that what the Firemen and Enginemen contend for is righteous, that is the way it looks to me in their controversy with the Engineers.*

"We have a quick conscience in America, and the detailing of a situation itself simply precludes any mind not affected with interest from viewing it in any way except as I have indicated." (R. 76-77.) (Italics ours.)

We suggest that this Court should give serious regard to the District Court's decision rejecting the petitioner's contention when it is expressed in language as positive and vigorous as the foregoing.

We submit that the judgment and decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HAROLD C. HEISS,

RUSSELL B. DAY,

T. D. GRESHAM,

Attorneys for Respondent,
General Grievance Committee of the Brotherhood of Locomotive Firemen and Enginemen.